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IN THE UNITED STATES DISTRICT COURT
DISTRICT COURT OF NEW JERSEY

STATE OF NEW JERSEY,)
NEW JERSEY DEPARTMENT OF)
ENVIRONMENTAL PROTECTION)
)
Plaintiff,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY and STEPHEN L.)
JOHNSON, ADMINISTRATOR, IN HIS)
OFFICIAL CAPACITY)
)
Defendants.)
_____)

CIVIL ACTION NO.

ELECTRONICALLY FILED

**COMPLAINT FOR
INJUNCTIVE RELIEF**

The State of New Jersey, New Jersey Department of Environmental Protection
("NJDEP"), represented by, and by authority of, the Attorney General of the State of New Jersey,
alleges:

NATURE OF THE ACTION

1. Pursuant to 42 U.S.C. § 7604(a)(2), Plaintiff commences this civil action against defendants United States Environmental Protection Agency (“EPA”) and Stephen L. Johnson in his official capacity as Administrator of EPA, based on the Administrator’s and EPA’s failure to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7661d(b)(2) of the Clean Air Act (“CAA” or “Act”).

2. Under the Act, the Administrator of EPA has a nondiscretionary duty to either grant or deny a petition filed pursuant to Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), within 60 days after such petition is filed. 42 U.S.C. § 7661d(b)(2).

3. On July 21, 2006, NJDEP filed a petition pursuant to Section 505(b) of the Act (“Title V Petition”) with EPA, thereby formally objecting to the Pennsylvania Department of Environmental Protection’s (“PADEP”) proposed issuance of a revised permit under Title V of the Act to Reliant Energy Mid-Atlantic Power Holdings LLC (“Reliant”). See Title V Petition with Exhibits 1-4, attached hereto as Exhibit A. Reliant owns and operates several coal-fired power plants in Pennsylvania, including the Portland Generating Station (“Portland Plant”), which is located in Upper Mt. Bethel Township, Northampton County, Pennsylvania. NJDEP’s Title V Petition is based on two objections: schedules of compliance must be added to the permit for the Prevention of Significant Deterioration (“PSD”) and/or New Source Performance Standards (“NSPS”) rules and the permit must contain operational limits in the form of heat input limits.

4. EPA has failed to respond to NJDEP’s Title V Petition.

5. New Jersey brings this civil action pursuant to 42 U.S.C. § 7604(a)(2) to compel the Administrator to perform his nondiscretionary duty to either grant or deny NJDEP's Title V Petition.

JURISDICTION, VENUE AND NOTICE

6. This is a citizen suit to enforce the Clean Air Act. Thus, this Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. § 7604(a). The Clean Air Act is a federal statute, and defendants are agents of the United States' government. Thus, this Court has subject matter jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question) and § 1346 (United States as defendant).

7. Venue is proper in the District of New Jersey pursuant to 28 U.S.C. § 1391(e)(3) because no real property is involved in this matter to compel EPA to perform its nondiscretionary duty and because Plaintiff NJDEP is subject to the personal jurisdiction of this Court.

8. Pursuant to 42 U.S.C. § 7604(b)(2), on December 7, 2006, NJDEP provided via certified mail to the Administrator of EPA and the Regional Administrator of Region III of EPA, as well as Pennsylvania officials and a representative of Reliant, notice of NJDEP's intent to sue EPA for its failure to perform a nondiscretionary duty. See NJDEP's December 7, 2006 Notice of Intent to Sue, attached hereto as Exhibit B.

9. The 60 day statutory notice period pursuant to 42 U.S.C. § 7604(b)(2) thus has tolled on February 5, 2007. Defendants have not acted to remedy the violations alleged in this notice. Therefore, a present and actual controversy exists between the parties.

THE PLAINTIFF

10. Plaintiff, the New Jersey Department of Environmental Protection, is an administrative agency in the executive branch of the New Jersey State government and maintains

its principal offices at 401 East State Street, Trenton, Mercer County, New Jersey. The NJDEP is required to conserve the natural resources, promote environmental protection, and prevent pollution to the environment of the State. See N.J.S.A. 13:1D-9. NJDEP brings this action on behalf of itself and, as *parens patriae*, on behalf of all residents and citizens of the State.

THE DEFENDANTS

11. EPA is an administrative agency in the executive branch of the United States government and is headquartered at 1200 Pennsylvania Avenue, N.W., in Washington, D.C. The Administrator of EPA is Stephen L. Johnson. EPA is comprised of Regions and each Region is responsible for the execution of EPA's programs in the Region's assigned states. Region III of EPA is responsible for the execution of EPA's programs in Pennsylvania. Donald S. Welsh is the Regional Administrator of EPA's Region III, which is located at 1650 Arch Street in Philadelphia, Pennsylvania.

STATUTORY AND REGULATORY BACKGROUND

12. The Act establishes a regulatory scheme designed to protect and enhance the quality of the nation's air in order to promote the public health and welfare and the productive capacity of the population. 42 U.S.C. § 7401(b)(1).

13. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for "major sources" like Reliant's Portland Plant. See 42 U.S.C. 7661; see also 42 U.S.C. § 7602(j). The purpose of Title V is in part to ensure that all "applicable requirements" for compliance with the Act, including the PSD and NSPS provisions, are collected in one place. 42 U.S.C. § 7661c(a). A Title V permit must accordingly include, *inter alia*, enforceable emission limitations and standards and a schedule of compliance. Id. Specifically, under Section 504(a) of the Act, 42 U.S.C. §

7661c(a), and 40 C.F.R. § 70.1(b), each facility that is subject to Title V permitting requirements must obtain a permit that “assures compliance by the source with all applicable requirements.” Applicable requirements include, for example, NSPS requirements pursuant to Section 111 of the CAA, 42 U.S.C. § 7411, any term or condition of a PSD permit, and requirements contained in a State Implementation Plan. 40 C.F.R. § 70.2. If a facility is in violation of an applicable requirement at the time that it receives a Title V permit, the facility’s permit must include a compliance schedule. See 40 C.F.R. § 70.5(c)(8)(iii)©. The compliance schedule must contain “an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of the permit issuance.” Id.

14. Section 502(a) of the Act, 42 U.S.C. § 7661a(a), makes it unlawful for any person to violate any requirement of a permit issued under Title V or to operate a major source except in compliance with a permit issued by a permitting authority under Title V. The State of Pennsylvania has adopted regulations to implement the Act’s Title V operating permit program. 25 Pa. Code § 127.501 et seq. Like section 504(a) of the Act, 42 U.S.C. § 7661c(a), the Pennsylvania Title V operating permit program requires that each Title V permit include, among other things, enforceable emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. 25 Pa. Code § 127.512(h). A source operating in violation of applicable requirements, including PSD and NSPS, must include a schedule for compliance with those requirements in its Title V permit application. Id. at § 127.503(8)(iii).

15. Under Section 505(b)(1), 42 U.S.C. § 7661d(b)(1), and 40 C.F.R. § 70.8(c)(1), the Administrator must object to the issuance of a proposed Title V permit if he determines that the permit does not comply with the applicable requirements of the Act or the regulations. See also

New York PIRG v. Whitman, 321 F.3d 316, 334 (2d Cir. 2003) (EPA “does not have discretion whether to object to draft permits once noncompliance has been demonstrated”). The Administrator must object within 45 days after receiving the proposed permit or within 45 days after receiving notice. 42 U.S.C. § 7661d(b)(1). Under Section 505(b)(2), “[i]f the Administrator does not object in writing to the issuance of a permit ..., any person may petition the Administrator within 60 days after the expiration of the 45-day review period.” 42 U.S.C. § 7661d(b)(2).

16. Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), expressly provides that the “Administrator shall grant or deny [a Title V petition] within 60 days after the petition is filed.” (emphasis added). This provision imposes a mandatory, nondiscretionary duty upon EPA to act within 60 days of the filing of a petition under this section. See e.g., Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987); Environmental Defense Fund v. Thomas, 870 F.2d 892, 897 (2d Cir. 1989).

17. Pursuant to 42 U.S.C. § 7604(a)(2), any person may bring suit in district court against the Administrator of EPA “where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.” See also Sierra Club, 828 F.2d at 790.

18. 42 U.S.C. § 7602(e) defines “person” to include, *inter alia*, a State or a political subdivision of a State and an agency of the United States and any officer, agent, or employee thereof. NJDEP, EPA, and the Administrator are each a person within the meaning of 42 U.S.C. § 7602(e).

19. 42 U.S.C. § 7604(a) authorizes injunctive relief.

FACTS

20. The Portland Plant includes five electricity generating units, with two units consisting of one boiler and one steam turbine and three units consisting of simple-cycle turbines. Unit 1 was placed into service in 1958 and has a capacity of 158 Megawatts (MW). Unit 2 was placed into service in 1962 and has a capacity of 242 MW. As a byproduct of the production of electricity, the Portland Plant emits SO₂, nitrogen oxides (“NO_x”), particulate matter (“PM”), and many other air contaminants. Upon information and belief, from 1982 to 1995, the average emissions at Portland Units 1 and 2 was 23,057 tons per year of SO₂ and between 2003-2005, 29,357 tons of SO₂ for Units 1 and 2. A May 2005 report by the Environmental Integrity Project, “Dirty Kilowatts America’s Most Polluting Power Plants,” ranks Portland as number eight in the country in terms of highest SO₂ emissions per MW of electricity generated in 2004. The 2003-2005 average NO_x emissions from Units 1 and 2 was 3,127.1 tons per year. With proper controls as required by the PSD provisions of the Act for the “modifications” undertaken at the Portland Plant, these NO_x emissions would be significantly lower.

21. At least between 1979 and 1995, “modifications,” as defined in 42 U.S.C. §§ 7411 and 7479, were undertaken at the Portland Plant in violation of the PSD provisions of the CAA and likely in violation of the NSPS provisions of the CAA. See November 16, 2005 Notice of Intent to Sue Reliant, attached hereto as Exhibit C.

22. In or around January, 2000, PADEP issued a permit for the operation of the Portland plant (“Title V permit”). The Title V permit contained various conditions, limitations, and other requirements for operation of the Portland Plant. On May 29, 2003, PADEP issued a

revised Title V permit for the operation of the Portland Plant. In June 2005, the proposed Title V permit renewal for the Portland Plant was released for public comment. All versions of the Title V permit listed 1,657.20 million BTU per hour as a maximum heat input rate for Unit 1 of the Portland Plant and 2,511.60 million BTU per hour as a maximum heat input rate for Unit 2.

23. In June 2005, PADEP released to the public and EPA simultaneously for comment a draft and proposed Title V permit for the Portland Plant. EPA submitted comments on the proposed permit to PADEP on June 24, 2005 but did not formally object to the permit. Because of the concurrent review process, NJDEP on July 8, 2005 also submitted comments to PADEP on the proposed permit, but such comments were received after EPA submitted its comments. Based on information and belief, EPA, PADEP and Reliant had various discussions and meetings regarding the proposed Title V permit for the Portland Plant through May 2006. PADEP sent a final permit to EPA on or about May 24, 2006 marked “unofficial.”

24. On July 21, 2006, NJDEP filed its Title V Petition with the Administrator and Regional Administrator of EPA. See Title V Petition, attached hereto as Exhibit A. NJDEP’s Title V Petition is based on objections that were raised in its comments during the public comment period. See 42 U.S.C. 7661d(b)(2). This Title V Petition demonstrates that the Portland Plant is not in compliance with the CAA and applicable regulations and that the proposed permit fails to address this noncompliance. First, the proposed permit lacks a compliance schedule designed to bring the Portland Plant into compliance with the Clean Air Act requirements. Specifically, the proposed permit does not reflect the fact that NJDEP, on November 16, 2005, issued a notice to Reliant of CAA violations at the Portland Plant, i.e., that the plant was modified in violation of the PSD and likely in violation of NSPS requirements.

See November 16, 2005 Notice of Intent to Sue Reliant, attached hereto as Exhibit C. This notice was based on a review of numerous documents provided to EPA by Reliant pursuant to Section 114 of the Act, 42 U.S.C. § 7414. Information reviewed by NJDEP further demonstrates that the coal-fired Units 1 and 2 at the Portland Plant increased their heat input capacity due to physical or operational changes that resulted in significant emissions increase of SO₂, NO_x and PM. See also New York PIRG v. Johnson, 427 F.3d 172, 180 (2d Cir. 2005) (“[I]ssuance of ... NOV_s and commencement of the suit is a sufficient demonstration to the Administrator of non-compliance for purposes of the Title V permit review process”).

25. Second, the “unofficial” final Title V permit for the Portland Plant lacks any limits on maximum allowable heat input capacities for Units 1 and 2. As a result, this Title V permit for the Portland Plant allows Units 1 and 2 to increase hourly emissions for NO_x, PM, and SO₂ without violating the emission restrictions set forth in the permit. In addition, the emission rates for PM and NO_x emissions from Unit 1 are not tied to any time limit. As a result, the failure to include heat input limits in the proposed Title V permit will allow increased NO_x emissions from Unit 1 and increased PM emissions from both units over all averaging times. Therefore, operational restrictions in the form of heat input limits are needed in the Title V permit to ensure that emissions from the Portland Plant do not cause adverse health effects to the public or lead to exceedances of the NAAQS for NO_x, SO₂, and PM and to assure compliance with Pennsylvania’s State Implementation Plan.

26. The mandatory, nondiscretionary deadline by which EPA was required to either grant or deny NJDEP’s Title V Petition ended on September 22, 2006. EPA has not responded at

all to NJDEP's Title V Petition and it has been more than 180 days since NJDEP filed the Title V Petition.

CLAIM FOR RELIEF

27. Plaintiff repeats and realleges the preceding paragraphs as if fully incorporated herein.

28. NJDEP filed with the Administrator and Regional Administrator of EPA its Title V Petition objecting to PADEP's proposed Title V permit to Reliant for the Portland Plant on July 21, 2006. EPA has a mandatory duty to respond within 60 days to NJDEP's petition requesting that EPA object to the Reliant Portland Plant Title V Operating Permit pursuant to 42 U.S.C. § 7661d(b)(2).

29. The 60 day deadline expired on September 22, 2006.

30. EPA has not taken final action on NJDEP's petition.

31. Therefore, EPA has violated, and remains in violation of, its non-discretionary duty to grant or deny NJDEP's petition within 60 days as required by 42 U.S.C. § 7661d(b)(2).

PRAYER FOR RELIEF

WHEREFORE, NJDEP requests that this Court:

A. Order EPA and the Administrator to grant or deny NJDEP's Title V Petition in accordance with an expeditious schedule prescribed by the Court;

B. Declare that EPA and the Administrator have failed to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7661d(b);

C. Award NJDEP its costs of this action, including reasonable attorney fees; and

D. Grant such other relief as the Court deems just and proper.

DATED: February 6, 2007

Respectfully submitted,

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY

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DESIGNATION OF TRIAL COUNSEL

_____ Kevin P. Auerbacher is designated as trial counsel in this matter.

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Dated: February 6, 2007

CERTIFICATION PURSUANT TO L.R. CIV. PR. 11.2

_____ I hereby certify pursuant to L. Civ. Rule 11.2, the New Jersey Department of Environmental Protection, as indicated in this Complaint, filed with the United States Environmental Protection Agency a petition pursuant to Title V of the Clean Air Act, 42 U.S.C. §§ 7401 et seq., asking that the Agency object to a proposed permit under Title V of the Clean Air Act to Reliant Energy Mid-Atlantic Power Holdings LLC for the Portland Generating Station in Upper Mount Bethel Township, Pennsylvania. I certify that I am currently aware of no other action pending in any court, or any pending arbitration or administrative proceeding, related to the subject matter of this litigation.

_____ s/ Kevin P. Auerbacher (KA 9707)

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Dated: February 6, 2007